U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue date: 09Aug2001

Case No.: **2000-INA-00263**
CO No.: **P1996-CA-09051842/AT**

In the Matter of:

John DeJong Dairy
Employer,

on behalf of:

Joaquim M. Cota
Alien.

Appearance: N. Simoes
for Employer and Alien

Certifying Officer: Pandora L. Wong
San Francisco, California

Before: Vittone, Burke and Chapman
Administrative Law Judges

LINDA S. CHAPMAN
Administrative Law Judge

Decision and Order

This case arose from an application for labor certification on behalf of Joaquim M. Cota ("Alien") filed by John DeJong Dairy ("Employer") pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the "Act"), and the regulations promulgated thereunder, 20 C.F.R. Part 656. The Certifying Officer ("CO") of the United States Department of Labor, San Francisco, California, denied the application, and the Employer and the Alien requested

review pursuant to 20 C.F.R. § 656.26.

Statement of the Case

On December 26, 1995, the Employer filed an Application for Alien Employment Certification. The application described the position as "Herdsman/Maintenance" and required that the employee oversee 650 to 800 head of cattle. The application stated that 54 hours a week were to be worked and that the salary was $2500 per month. AF 59-61.

On April 14, 2000, Regional Administrator Armando Quiroz (RA) issued a Notice of Findings (NOF) in which he stated his intent to deny the application for two reasons. First, he questioned whether a job opening existed. He quoted an August 28, 1996 letter from the Employer, stating that while the pay was still based on an hourly rate of $7.60, the number of hours worked was less due to the depressed market for beef and veal. The RA required that, in rebuttal, the Employer document that the position exists and that the "employee is earning at least $14.53 an hour." Second, he questioned whether the prevailing wage was being offered. He stated that the prevailing wage was $2500 per month, or $14.53 an hour.[1] While the application stated that the salary was $2500 per month, the previously cited letter indicated that the wage was actually less. On rebuttal, the RA required that the Employer document that the rate of pay was at least 95% of $14.53 per hour, or that the wage offered was at least 95% of the prevailing wage for the occupation. He further stated that the "employer cannot lawfully advertise a wage at one level and then attempt to deflate the wage with an explanation of inability to pay."

By way of rebuttal, the Employer submitted a letter that was received on May 8, 2000, stating that the difficulties alluded to in the August 28, 1996 letter were of a "brief duration" and no longer existed. He said:

> The $2,500 monthly salary, as stated in the job advertisement, includes housing (plus utilities). These two items can easily exceed $1,050 per month. Dairy work can involve long hours, so 54 hours per week is not uncommon. Thus, housing and salary combined can exceed the $2,500 advertised. Even on a 48 hour work week, the take home pay might be less, but the $2,500 starting salary is still met. Few, if any, dairies in the San Joaquin Valley pay $14.53 p / h plus housing as a starting salary.

The Employer also noted the other benefits of working at a dairy, although these other incentives were not included in the wage offer. AF 24.

On May 30, 2000, Certifying Officer Pandora L. Wong (CO), issued a Final Determination

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[1] This figure appears to be based on a forty hour work week.

(FD) in which she denied certification. The CO concluded that the Employer remained in violation of 20 C.F.R. 656.21(e) and 656.40(a)(2)(i). With regard to the existence of a job opening, the CO determined that this issue had been remedied in the rebuttal. However, with regard to the prevailing wage issue, the CO determined that the prevailing wage was not being paid. She noted that the ETA 750A form had no provision for payment of overtime;[2] therefore, any hours worked in excess of 40 would be paid at the same rate as those below 40, thus "eroding the salary paid for normal hours." She further noted that the Employer failed to document his claim that other dairies in the area pay less than $14.53 per hour. She ultimately concluded that "[t]he employer has not shown conclusively that a basic rate of $2,500 per month is paid exclusive of any other benefits, or that hours worked in excess of 40 per week are remunerated in keeping with state provisions for overtime hours worked. Based on this finding, labor certification is denied." AF 21-23.

The Employer submitted a letter dated June 12, 2000, addressed to the Chief Administrative Law Judge, requesting a review of the CO's denial. AF 1. Included was a letter of the same date from N. Simoes, the Employer's representative, addressed to the CO, in which Mr. Simoes argues that the Employer did not misrepresent the wage offered, and notes that the $2500 monthly figure includes housing. Mr. Simoes states "[s]ince housing and utilities have been ignored, does it mean these are considered by you as a benefit or incentive? The IRS considers it as collateral and as such taxable." He also noted that dairy workers must work 60 hours per week before qualifying for overtime, and concluded:

> We feel your decision and that of Armando Quiroz might have been different had your local Employment Office given accurate information. We are confident this new information will enable you to now reverse your decision.

AF 7-8. Finally, the Employer included a "Dairy Survey," dated June 2000, which indicated that "A survey of numerous dairies confirmed our previous assertion that none, if any, paid $14.53 an hour as a starting salary." AF 12. The Employer also listed five dairies "for your convenience in auditing." The Employer also stated that

> Attorney LaSalle[3] best summarized local dairy pay for a 60 hour work-week: $2,000 per month without housing & $1,400 per mo. with housing. As can be seen, the DeJong's pay better & require less hours. This might help clarify 'even on a 48 hour workweek, the take home pay might be less, but the $2,500 starting salary is still met.

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[2] In fact, in an addendum to the ETA 750, the Employer noted that agricultural workers were allowed to work 60 hours before eligibility for overtime, and that the Employer would pay overtime at the rate of $11.40. AF 62.

[3] "Attorney LaSalle" is not further identified in the case file.

The case was forwarded to the Board on July 11, 2000 for review,[4] and a Notice of Docketing and Order Requiring Statement of Position or Legal Brief was issued on July 31, 2000. Thereafter, this office received three identical packets from the Employer on August 17, 2000 (by facsimile), August 22, 2000, and August 25, 2000. The packet includes a letter dated August 14, 2000, from Arie Jan DeJong, the Employer's Vice President, stating that all California dairy workers work a 60 hour week; the applicable law was attached. Mr. DeJong further stated that the Alien received housing and health insurance, and noted that the CO had "steadfastly refused to address the housing issue." He also reported that the pay had increased to $11.85 an hour over the years, and time and a half was paid for overtime. Mr. DeJong concluded: "In summary, I am not now, nor have I ever been, in violation of underpaying my employees. Joaquim Cota is certainly an exceptional and valued employee. If the law requires me to pay prevailing wage to this agricultural employee, than I will be willing to pay the $14.53 you request." A copy of N. Simoes' June 12, 2000, letter was also included in the packet, as well as a letter from the Alien, dated August 16, 2000, in which he states his desire to remain in the United States.

Discussion

The issue as presented by the CO in the FD is whether the Employer has offered the prevailing wage for the position. The Board has previously held that "when challenging the CO's finding of the prevailing wage, an employer bears the burden of establishing both that the CO's determination is in error, and that the employer's wage offer is at or above the prevailing wage." *PPX Enterprises, Inc.*, 1988-INA-00025 (May 31, 1989) (en banc).

A review of the record in this case shows that the Employer's intention is to offer a wage of $7.60 an hour.[5] Thus, the Employer's original draft of its newspaper advertisement indicated that the salary was $7.60 per hour, with housing or a housing allowance provided. AF 79. This was corrected by the local employment office to read $2500 a month, including housing or a housing allowance. AF 77. The advertisement that the Employer subsequently ran offered a salary of $2500 a month, including housing or an allowance. Although these drafts, and the final advertisement, are somewhat ambiguous, and could be read as offering $2500 a month, plus housing or a housing allowance, a review of the file as a whole clearly shows that the Employer intends to offer $7.60 an hour and free housing, and that the Employer views the figure of $2500 a month, as amended by the local employment office, as a sort

[4] The CO determined that this submission was in the nature of a second rebuttal, and notified the Employer that it had 35 days to request reconsideration or appeal to the Administrative Law Judge. AF 19020. After receiving a call from a Congressman's office, the file was reviewed, and on July 10, 2000, the Employer's appeal was noted. AF 16-17.

[5] The Board cannot consider the Employer's statements, made for the first time on appeal, that it now intends to offer $11.85 an hour.

of minimum guarantee.[6] In other words, the Employer believes that the combined value of the housing, plus the payment of $7.60 an hour, will always equal at least $2500 a month.[7]

It is not at all clear from the letter submitted by the Employer in rebuttal whether the Employer was arguing that it met the prevailing wage of $14.53 by virtue of inclusion of the value of housing, or that $14.53 was not the correct prevailing wage. Even assuming that the value of housing provided by the Employer is properly included in the calculation of wages (a question that need not be decided here), the Employer has provided insufficient information as to the value of the housing it provides (i.e., the Employer has stated only that the value of housing and utilities "easily exceeds" $1050 a month), much less supporting documentation or evidence for such a figure. Thus, even assuming that the value of housing is properly included in the calculation of wages, the Employer has not met its burden of establishing that it will pay the prevailing wage of $14.53 an hour, as set out by the CO.

Nor did the Employer provide sufficient information to establish a different prevailing wage. The Employer's statement that few, if any, dairy employers pay a $14.53 hourly rate exclusive of housing, is clearly insufficient to establish a different prevailing wage. An employer should provide sufficient background information about its survey to allow a test of the adequacy of the sample. *Zenith Manufacturing and Chemical Corp.*, 1990-INA-211 (May 31, 1991). In its rebuttal, the Employer did not identify a single competitor that was contacted, much less the salary paid by the competitor for the specific position in question.

In its request for review, the Employer submitted a "Dairy Survey," in which the Employer claimed that its survey of "numerous" dairies confirmed its previous statements that no dairies paid $14.53 an hour as a starting salary. The Employer listed five dairies "for your convenience in auditing," but did not indicate if those were the dairies that the Employer contacted, the precise duties of the position in question, or what wage those dairies offered. There is no evidence in the administrative file that the CO considered this "Dairy Survey," and thus it cannot be considered by the Board on appeal.[8]

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[6] In the ETA 750, the Employer listed a monthly wage of $2500, but also indicated that overtime would be paid at $11.40 an hour, which, if it represents time and a half, is based on an hourly rate of $7.60. AF 60.

[7] This is confirmed by the letter submitted by the Employer in rebuttal, stating that the combination of housing and salary can exceed $2500, but in any event, that combination will be at least $2500. AF 24.

[8] Evidence first submitted with the request for review will not be considered by the Board. *Capriccio's Restaurant*, 90-INA-480 (Jan 7, 1992); *Kelper International Corp.*, 90-INA-191 (May 20, 1991). As noted by the Board of Alien Labor Certification Appeals in *Carlos Uy III*, 1997-INA-304 (Mar 3, 1999)(*en banc)*, "[u]nder the regulatory scheme of 20 C.F.R. Part 24, rebuttal following the NOF is the employer's last chance to make its case. Thus, it is the employer's burden at

But even if it were considered, it clearly is inadequate to establish a prevailing wage different than the $2500 a month (or $14.53 an hour) wage proffered by the CO. This alleged survey does not specifically state the duties of the position surveyed, it does not specifically identify the competitors that were contacted, and it does not state the wages paid by the "numerous" employers surveyed, much less document the wages paid.

The RA, in the NOF, put the Employer on notice that it should document that it was offering $2500 a month (or $14.53 an hour), the stated prevailing wage, or that it was offering the prevailing wage, effectively allowing the Employer to put on evidence that the CO's determination of the prevailing wage was incorrect. The Employer did neither. In fact, in its rebuttal, the Employer confirmed that it was offering a wage of substantially less, exclusive of the value of the housing it was providing.[9] Nor did the Employer establish a prevailing wage different than that proffered by the CO, much less that it met that prevailing wage.

The burden is on the Employer to establish that certification is appropriate. The Employer did not meet that burden here, and we find that the CO correctly concluded that the Employer failed to document that it was paying the proffered prevailing wage, or that the prevailing wage determination was incorrect. Accordingly, we conclude that the CO properly denied labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A
Linda S. Chapman
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

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that point to perfect a record that is sufficient to establish that a certification should be issued." *Id.* at 8.

[9] Not only did the Employer fail to document the value of the housing it was offering, it never quantified the amount of the "housing allowance" it offered in its newspaper advertisement.

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Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.